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sented, the Court's accounting was undoubtedly right, but regarding the contract as entire, which human nature would lead us to believe the parties intended it to be, there is much to be said for its validity. At least it is hard to comprehend the state of mind of the sureties, when they designed this agreement, under any other interpretation of its intention.

TIME THE ESSENCE OF A CONTRACT.

In *Zempel v. Hughes, et al.*, 85 Northeastern Reporter, 641, decided in the Supreme Court of Illinois, June 18, 1908, the facts showed a written agreement whereby B agreed to convey to A a farm for the price of \$18,000, \$500 being paid at the time the agreement was entered into, December 12, 1904, \$7500 to be paid "on or before February 28, 1905," and the remaining \$10,000 to be satisfied by a conveyance by A to B of two properties therein mentioned. The agreement further read: "but should A fail to perform his contract on his part promptly at the time and in the manner specified, then the above \$500 shall be forfeited as liquidated damages and the above contract shall become null and void." A, having on several days previous to February 28, 1905, unsuccessfully attempted to meet B, went on that day to the latter's home and told B's daughter that he was there to close the trade, at the same time showing his deeds for the properties which he was to convey, and the balance of the purchase price in cash, but B could not be found. A few days later—on March 1, 1905,—A made a tender to B, who refused to accept, telling A that he was too late. The Chancellor in the lower court dismissed A's bill for specific performance, but his decision was reversed on appeal.

One of the points argued by B, the vendor, was that time was made of the essence of the contract by its terms, and that as A, the vendee, had not performed on the day named in the agreement, he could not maintain his bill for specific performance. The Court, in answering this, said: "In equity, time is not necessarily deemed of the essence of the contract; but, if it is made so by the terms of the agreement, it will be treated in equity, as in law, as of the essence. But, even where the contract so provides, equity, under peculiar circumstances, may not enforce a forfeiture." The Court further said, that conceding that time was made of the essence of the contract by its terms, it was manifest from the circumstances as shown by the evidence, that B, the vendor, was entirely responsible for the failure of A, the vendee, to make the tender within the

time provided in the contract, as B had obviously tried to avoid meeting A for the purpose of closing the contract for several days previous, and A was clearly excused.

The final decision in the case seems to be in accord with principles which are very well established. In all ordinary cases of contract, equity does not regard time as of the essence of the agreement. This principle has been established by a long line of cases. In one of the earliest cases,¹ Lord Eldon remarked: "To say time is regarded in this court, as at law, is quite impossible." In a Pennsylvania case,² decided early in the nineteenth century, Mr. Justice Gibson enunciated the same doctrine as Lord Eldon had previously expressed in England. The contract was for the sale of certain land, the agreement providing for the payment of the purchase money in installments. The last installment became due on April 1, 1816. On April 3, \$600 was accepted by the vendor, there being evidence to show that there was at the time of acceptance an agreement made whereby the vendor agreed to take the money only on condition that if the vendee should not pay the balance on the 6th of April, the contract should be void. The money was not tendered until the 15th of August following; and, the vendor refusing to convey, a bill for specific performance was brought by the vendee. Specific performance was decreed, the Court saying that, "Where time admits of compensation, as it perhaps always does where lapse of it arises from money not having been paid at a particular day, it is never an essential part of the agreement." The Court also held that the subsequent agreement, that if the whole sum should not be paid at a certain day, the payment then made should be forfeited, and the original bargain be at an end, gave the vendor no additional right to rescind.

In a case decided in Illinois in 1845,³ counsel for the vendee, against whom specific performance was asked, contended that unless a party were held to strict performance, except where he showed an excuse for non-performance, fidelity in the execution of contracts would be destroyed, and that if a delay of a week would not cut off a party from relief in Chancery, neither should a delay of a year operate to have that effect. The Court, however, refused to be influenced by this view, saying that in the case at bar the parties evidently did not mean that the contract should be void, if not performed on the day

¹ *Seton v. Slade*, 7 Ves. 265.

² *Decamp v. Feay*, 5 S. & R. 323.

³ *Andrews v. Sullivan*, 2 Gilman, 327.

named. But, continued the Court, by way of dictum, "even if the vendor were bound to tender a deed on the day named, his delay was satisfactorily accounted for by his absence and unexpected detention from home." The vendor had been called away on business, previous to the day named for performance, and had not returned by that time. It would seem that this dictum goes to an extreme not warranted by the authorities. Ordinarily, where the parties have made time of the essence of the contract, the agreement will be enforced;⁴ and it is difficult to see why the vendor's attention to business elsewhere on the day of performance should be considered sufficient excuse to prevent the forfeiture of his right to enforce, subsequently, a contract, of which, by its terms, time was to be of the essence. A more equitable rule was laid down by the Supreme Court of Maine: in a bond conditioned to convey land upon the payment of a note, it was provided that "in case the obligee should neglect or refuse to pay the note according to its tenor, the bond should be void. The delay was excused by proof that the obligee was prevented by illness from attending to the matter at the day specified, and on recovery of his health, sought permission of the obligor to pay it. Upon refusal, he asked equity to aid him. The Court, in allowing him relief, said: "The party seeking relief from a forfeiture must show, that circumstances, which exclude the idea of willful neglect or of gross carelessness, have prevented a strict compliance, or that it has been occasioned by the default of the other party, or that a strict compliance has been waived."⁵

In *Zempel v. Hughes*, *supra*, the Court having decided that time was not of the essence of the contract, its further expressions on the subject must be regarded as *dicta*, but nevertheless, as sound. Although it may be argued with considerable force that where time is of the essence of a contract, a party in default through illness should not be allowed to compel performance, it is impossible to comprehend a court of equity refusing to allow performance of a contract where the default of the party asking relief has been caused by the other party. To so refuse would be to allow one party to take advantage of his own wrong, and the opinion of the Court is a clear enunciation that, this equity will not do, although by refusing performance, the Court would be enforcing the contract according to the strictness of its terms.

⁴ *Smith v. Brown*, 5 Gilman (Ill.), 309.

⁵ *Jones v. Robbins*, 29 Me. 351.